Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER STEVAS,
CLERK

82-892

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

PATRICK W. HANIGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. _____

(Ninth Circuit No. 79-1823)

PETITION FOR CERTIORARI
TO REVIEW DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAYNES & ROCKAFELLOW, P.C.
By: Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

Date of Mailing: November 26, 1982

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

PATRICK W. HANIGAN,	)	
	)	
Petitioner,	)	No._____
	)	
vs.	)	
	)	(Ninth Circuit
UNITED STATES OF AMERICA,	)	No. 79-1823)
	)	
Respondent.	)	
	)	

PETITION FOR CERTIORARI
TO REVIEW DECISION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAYNES & ROCKAFELLOW, P.C.
By: Alex A. Gaynes
2438 East Broadway
Tucson, Arizona 85719

Date of Mailing: November 26, 1982

QUESTION PRESENTED

The question presented is: How can Patrick Hanigan have knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce by virtue of an alleged robbery of $40.00, a keyring, and a dollar bill, respectively, from three illegal Mexican aliens, traveling from Mexico towards Elfrida, Arizona in hopes of possibly receiving work at an agricultural business in the State of Arizona?

TABLE OF CONTENTS

	Page No.
TABLE OF AUTHORITIES	i
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS OF THE COURTS BELOW. .	2
STATEMENT OF THE CASE	3
QUESTIONS FOR REVIEW	4
STATEMENT OF THE CASE AND ARGUMENT	5
CONCLUSION	20
EXHIBIT A (Opinion of the U.S. District Court for the District of Arizona (Bilby, D.J.)	App A
EXHIBIT B (Opinion and Judgment of U.S. Court of Appeals for the Ninth Circuit	App B
EXHIBIT C (Denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc)	App C
EXHIBIT D (Indictment)	App D

TABLE OF AUTHORITIES

	Page No.
Bouie v. City of Columbia 378 U.S. 347 (1964)	17
National League of Cities v. Usery 426 U.S. 833, 96 S.Ct. 2465 49 L.Ed 2d 245 (1976)	16
Rewis v. United States 401 U.S. 808, 91 S.Ct. 1056 (1971)	15
United States v. Boulahanis 677 F.2d 586 (7th Cir. 1982)	19
United States v. Culbert 435 U.S. 371, 98 S.Ct. 1112 55 L.Ed. 2nd 349 (1978)	13, 14, 17
United States v. Mattson, 671 F.2d 1020 (1982)	6, 14, 18

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Patrick Hanigan, Petitioner herein, prays that a Writ of Certiorari issue to review the Opinion of the Ninth Circuit dated July 19, 1982, and the Order of the Ninth Circuit, denying Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc, dated September 22, 1982.

OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the District of Arizona (Bilby, D.J.) is reproduced in Appendix A. This Order dealt with essential issues to be raised in this Petition. The Order was dated December 14, 1979. The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed is reproduced in Appendix B. The denial of Petitioner's Motion for Rehearing and Suggestion for Rehearing en banc is reproduced in Appendix C.

STATEMENT OF THE CASE

Patrick Hanigan and his brother Thomas Hanigan were indicted and charged with three counts of violating the Hobbs Act, found at 18 U.S.C. §1951. At a joint trial in front of two juries in Phoenix, Arizona, Thomas Hanigan was acquitted and Patrick Hanigan was convicted.

The Court of Appeals upheld Mr. Hanigan's conviction on each of the three counts.

Mr. Hanigan, through his attorneys, filed a Petition for Rehearing and Suggestion for Rehearing en banc.

The Petition for Rehearing was denied on September 22, 1982. The decision denying Mr. Hanigan's Petition for Rehearing is the last substantive matter pending in front of the Ninth Circuit.

Subsequently, the Ninth Circuit Court granted until November 30, 1982, for Mr. Hanigan to file a Petition for a Writ of Certiorari prior to the issuance of the Ninth Circuit Mandate. This Court has jurisdiction pursuant to 28 U.S.C. §1254.

QUESTIONS FOR REVIEW

Patrick Hanigan is raising the issue of the scope of Federal Government power and its relationship to our system of government. The question is presented is: How can Patrick Hanigan have knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce by virtue of an alleged robbery of $40.00, a keyring, and a dollar bill, respectively, from three illegal Mexican aliens, traveling from Mexico towards Elfrida, Arizona in

hopes of possibly receiving work at an agricultural business in the State of Arizona?

It is submitted that there is no jurisdiction and was no jurisdiction, and any act at creating federal jurisdiction was and is impermissible under the Constitution.

STATEMENT OF THE CASE AND ARGUMENT

I. Introduction.

The United States Court of Appeals for the Ninth Circuit has sanctioned a reading of the Hobbs Act, found at 18 U.S.C. §1951, which drastically expands the interpretation of the Hobbs Act beyond that of every case ever decided anywhere in America under that Act. The Ninth Circuit has departed from all prior decisional law, and has acted contrarily

to the position espoused by the Seventh Circuit in United States v. Mattson, 671 F.2d 1020 (7th Cir. 1982), by ruling that by virtue of allegedly robbing $40.00, a keyring, and a dollar bill, respectively from three Mexican aliens traveling from Mexico towards Elfrida, Arizona in the hopes of obtaining work at an agricultural business in the State of Arizona, that Mr. Hanigan knowingly and wilfully obstructed, delayed, affected, and attempted to obstruct, delay and affect commerce.

Never before has there been a criminal prosecution under the Hobbs Act wherein the alleged victims were aliens, where the alleged victims were traveling on private property, where the alleged victims had no right to travel, where the alleged victims were trespassing, where the amounts involved were insig-

nificant, where the effects on interstate commerce were so tenuous at best, and linked only to possible consequences in the future, and where the government has attempted to clothe a "civil rights" prosecution under the guise of the Hobbs Act. Nor has there ever been a dual prosecution sanctioned, where the dual prosecution came as the result of political pressure, in an attempt to punish Patrick and his brother Thomas for being successful in a protracted Arizona court jury trial.

Yet, in this criminal case, with no prior basis in decisional law, the District Judge first, and now the Ninth Circuit have enlarged the scope of the Hobbs Act and have retroactively found that a cause of action existed, where at the time of the alleged incident under discussion (August 18, 1976), no such cause of action existed.

The Hanigans were charged with a violation of the Hobbs Act, after having been tried in the Superior Court of the State of Arizona and acquitted of 26 counts ranging from kidnapping and aggravated assault to robbery. After a two-year delay, they were charged once again by the federal government, this time under the guise of the Hobbs Act.

It is submitted that the Ninth Circuit's erroneous expansion of the Hobbs Act conflicts with all prior law and operates as ex post facto application of the statute in violation of due process.

In addition, the Ninth Circuit Opinion misconstrues two separate clauses of the Constitution.

In its Opinion, the Ninth Circuit Court notes that it "is anomalous to maintain that Congress could make undocumented entry into the United States...

unlawful, while at the same time maintaining that the same movement of persons is not 'commerce over which the United States has jurisdiction'".

The Ninth Circuit simply erred. The authority to allow entry into the United States is conferred upon Congress by one section of the United States Constitution, and the power to regulate commerce is afforded through another portion of the Constitution.

In other words, though entry into the United States of foreign nationals could conceivably be regarded as having an impact on United States commercial interests, the commerce power does not extend to this area. The immigration and naturalization clause of the Constitution extends the jurisdiction of Congress to this area. The commerce clause is separate. It must be separate if it is to retain its vitality.

The commerce clause is contained in Article 1, Sec. 8, Clause 3 of the Constitution, and the naturalization clause is contained in Article 1, Sec. 8, Clause 4 of the Constitution. The immigration and naturalization act is based on Clause 4 of Article 1, Sec. 8, NOT Article 1, Sec. 8, Clause 3.

While the commerce clause is broad, it cannot be made to destroy or make superfluous other portions of the Constitution.

The reading of the commerce clause by the Ninth Circuit makes every manner of offense a matter of federal concern. Not only is this beyond the resources of Congress, beyond the scope of the designers of the Constitution, and violative of the sacred principle of federalism, but it also adds a dangerous weapon to the arsenal of government.

If the federal government now has the authority to try all robberies with the most attenuated "potential" effects on commerce, then all state robberies are federal offenses. Who will be prosecuted? The weak, the meek, and individuals not part of any active lobbying force. Our law becomes an instrument of injustice rather than justice. The Ninth Circuit failed to grapple with and reach any of these important issues.

The record at trial was devoid of any affect on interstate commerce. The three individual alleged victims were allegedly on their way to seek work with a Mr. Wally Householder of Elfrida, Arizona. Mr. Householder revealed that commerce was not affected:

> "Question. (by Mr. Gaynes) In August of 1976, when Mr. Mata failed to show up and didn't bring

two other people with him, would it be fair to say that these three people not showing up on your farm on August 18, 1976, had absolutely no affect on any part of your business or operation in any conceivable manner; is that a true statement?

"Answer: Yes.

"Q. Would it also be a true statement to state that these three people not showing up on your farm on August 18, 1976, or even August 19, 1976, did not even have any potential impact or affect on any conceivable part of the operation of your business in any conceivable manner?

"A. Yes. "

TR.2079, LL.5-20.

Thus, the person to whom these individuals were allegedly going to work was not affected in any manner by non-appearance. Thus, the government was

unable to prove any arguable affect on interstate commerce.

Two additional witnesses were called by the prosecution to bolster its sagging commerce connection. The first witness, an individual named H. Barry Rose, revealed that he had previously employed one of the three complaining witnesses, but that he did not even own a farm in August of 1976. (TR, Vol. 11, 2043, LL.8-10) Furthermore, none of the complaining witnesses claimed they were on their way to work at Mr. Rose's formerly owned orchard. Another witness, a Mr. Ben Ratliff testified, but none of the complaining witnesses were even on their way to his farm on the day of the incident.

The Ninth Circuit has now sanctioned Hobbs Act use in a case in which there was no affect on commerce. U.S. v.

Culbert, 435 U.S. 371, 98 S. Ct. 1112 55 L. Ed. 2nd 349 (1978), the leading case on the Hobbs Act, does not speak in terms of "reasonably", "probably", or "potentially" affecting commerce. Culbert requires actual affect on commerce. The trial court in the Ninth Circuit relied heavily on Culbert, but erroneously. The lower courts went too far in following the "broad scope" language of the Supreme Court, and disregarded the clear, simple statement that the affect on commerce is "critical".

In addition, the rule in the Ninth Circuit now conflicts with the Seventh Circuit ruling in the case of U.S. v. Mattson, 671 F.2d 1020 (7th Cir. 1982).

II. Reasons for Granting the Writ.

Point 1.

The Ninth Circuit's expansion of the Hobbs Act is without precedent, con-

flicts with all prior case law, is based on a misapprehension of two important clauses of the Constitution, contradicts the rulings of the Seventh Circuit, and the specific congressional intent of the Hobbs Act.

Prior to the Ninth Circuit's decision, there had never been a Hobbs Act case even vaguely resembling this case. The trial judge noted in his Order at the onset of the case, in response to Mr. Hanigan's Motion to Dismiss, that:

> "Both parties have acknowledged this as a case of first impression involving aliens and alleged robbery under the Hobbs Act."

The importance of federal/state concerns are as applicable in this situation as in travel act cases. See Rewis v. U.S., 401 U.S. 808, 91 S. Ct. 1056 (1971). That case recognized that

"an expansive travel act would alter sensitive federal/state relationships, could overextend federal police resources, and might well produce situations in which geographic origin of customers, as a matter of happenstance would transform relatively minor state offenses into federal felonies." 401 U.S. at 812; 91 S. Ct. at 1059.

These concerns are equally applicable to the case at bar. They were the same types of concerns voiced by this court in National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465, 49 L.Ed. 2nd 245 (1976).

Point 2.

The retroactive application by the District Court and the Court of Appeals of its new, expansive interpretation of the Hobbs Act violates due process. The events alleged occurred on August 16, 1976. At that time, this

court had not decided U.S. v. Culbert, 435 U.S. 371 (1978).

Similarly, at the time of the alleged offenses, there is no way that any reasonable human being could assume that the Hobbs Act could apply to the acts under consideration. To expand this statute as it has been done runs afowl of the most fundamental notions of fair play. In Bouie v. City of Columbia, 378 U.S. 347 (1964), Mr. Justice Brennon wrote for this court: "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language....(a)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an Ex post Facto law,

such as Article One, Section 10 of the Constitution forbids....if a state legislature is barred by the Ex post Facto clause from passing such a law, it must follow that a State Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction." 378 U.S. at 352-354.

The Hanigans were charged in 1976, were acquitted in 1977 of all state charges, and were charged in 1979 with violations not even contemplated under the law when the alleged incidents occurred.

Point 3.

The issues raised are serious and important issues which must be grappled with by this court. The Seventh Circuit decided U.S. v. Mattson, 671 F.2d 1020 (1982), a case which is contrary to the ruling of the Ninth Circuit.

In the recently filed case of U.S. v. Boulahanis, 677 F.2d 586 (7th Cir. 1982), this court denied certiorari on November 15, 1982, in case No. 82-263, which left standing a Seventh Circuit decision contrary to that of the Ninth Circuit. That is, the Seventh Circuit enunciated a standard in Hobbs Act cases whereby they differentiated between Hobbs Act cases involving an affect on business versus an affect on individuals. The court in Boulahanis recognized that extortion has a greater effect on interstate commerce when directed at a business than at an individual. This philosophy and interpretation is contrary to the interpretation of the Ninth Circuit.

It is important for this court to straighten out the inconsistencies of the Circuits.

An important thrust of this petition is the extent of governmental authority over its citizens. This issue is important to individuals living in a regulated society and cries for this court's attention.

CONCLUSION

For these reasons, the court should accept the Petition for a Writ of Certiorari and reverse Mr. Hanigan's conviction.

Respectfully submitted.

GAYNES & ROCKAFELLOW, P.C.

By _____

Alex A. Gaynes
2438 East Broadway
Tucson, ARizona 85719
(602)792-4983